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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

CAROLE MIGDEN, et al.,

Plaintiffs,

vs.

CALIFORNIA FAIR POLITICAL PRACTICES COMMISSION, et al.,

Defendants.

No.: 2:08-CV-00486-LEW-EFB

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR PRELIMINARY INJUNCTION; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Hearing:

Date: April 16, 2008
Time: 10:00 a.m.
Crtrm: 25

(The Honorable Edmund F. Brennan)

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NOTICE OF MOTION AND MOTION FOR PRELIMINARY INJUNCTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT on April 16, 2008, at 10:00 a.m. or as soon thereafter as counsel can be heard, in the courtroom of and before the Honorable Edmund F. Brennan, Magistrate Judge of the United States District Court for the Eastern District of California, located at 501 "I" Street, Room 4200, Sacramento, California, plaintiffs will and hereby do move the Court under Federal Rule of Civil Procedure 65 and Local Rule 65-231 for a preliminary injunction prohibiting defendants California Fair Political Practices Commission, Ross Johnson, Timothy A. Hodson, A. Eugene Huguenin, Jr., Robert Leidigh and Ray Remy from enforcing section 89519 of the California Government Code to the extent that section limits plaintiffs' ability to transfer lawful campaign contributions from one campaign committee to another campaign committee of the candidate's. This application is based on this notice, the following memorandum of points and authorities, the accompanying Declarations of Carole Migden, Richard Ross, Roger Sanders and James C. Harrison, the accompanying proposed order, the Complaint filed herein, all papers filed and proceedings held in this case, and such other matters as the Court may consider.

Plaintiffs request that the Court enter a preliminary injunction restraining defendants and all of their officers, servants, agents, employees and persons in active concert or participation with them from enforcing or otherwise giving effect to section 89519 of the California Government Code to the extent it prohibits Senator Migden from transferring lawful contributions from one of her campaign committees to her Re-Elect Senator Carole Migden Committee. While plaintiffs do not anticipate the need to present oral testimony at the hearing, they estimate that the hearing will require a half hour to discuss the legal issues involved.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Some years back, the California Legislature felt compelled to pass a statute reminding the state Fair Political Practices Commission that it "shall take no action to implement [the Political Reform Act] that would abridge constitutional guarantees of freedom of speech . . . or that would deny

any person the equal protection of the laws." Cal. Gov't Code § 83111.5. That admonishment, however, has gone unheeded in the agency's treatment of state Senator Carole Migden.

Senator Migden, up for re-election to a second term in office, is facing a hotly contested primary election in June against three well-known challengers. Whoever wins the primary in the heavily-democratic 3rd Senate District is likely to win the general election in November, making this June the critical battleground. Senator Migden has $647,000 in campaign funds from previous elections that remain unspent. The campaign mailings and other advertising that could be paid for with the $647,000 could well make the difference in the June primary election.

Over 30 years ago, the U.S. Supreme Court in *Buckley v. Valeo*, 424 U.S. 1 (1976), held that the expenditure of campaign funds involves core political speech activity protected by the First Amendment. Any restrictions on such expenditures must pass "strict scrutiny" – that is, they must be narrowly tailored to meet a compelling state interest. In the more than 30 years since *Buckley*, the courts have routinely struck down attempts to limit a candidate's campaign expenditures. In particular, the U.S. Court of Appeals for the Ninth Circuit struck down a California statute that prevented candidates from transferring funds from their current election committee to another committee they had established for a future election. Such "intra-candidate" transfer bans, the court ruled, operate as an expenditure limit, are not justified by any compelling state interest and are not narrowly tailored. Following that ruling, the California Attorney General advised that the California surplus funds statute, Government Code section 89519, which prohibits candidates from transferring funds remaining in a prior election account to a future election account unless they do so within an arbitrary time frame, plainly is unconstitutional.

Notwithstanding the Attorney General's conclusion that Government Code section 89519 is unconstitutional, the California Fair Political Practices Commission, which is charged with enforcing the provision, has told Senator Migden that section 89519 bans her from using any of the $647,000 remaining from her prior campaigns because she did not properly report the transfer of the funds within the statutory time frame.

As the Attorney General concluded, the surplus funds statute is unconstitutional on its face. It operates as an expenditure limitation that cannot be justified by any compelling state interest. Moreover, because it allows or disallows expenditure of campaign funds based solely on whether the candidate meets an arbitrary time restriction, the statute is not narrowly tailored.

Even if it were constitutional on its face, however, the surplus funds statute would be unconstitutional as applied to Senator Migden. No other candidate of whom Senator Migden is aware has been told not to use their pre-Proposition 34 funds for an upcoming election. Other candidates for elective state office who transferred the funds within the arbitrary time limit have amassed warchests as large as $8 million to use in future elections, all with the FPPC's blessing. Moreover, the FPPC *allowed* the one other candidate who missed the arbitrary transfer deadline to use her surplus funds for a new election.

Attempts to resolve this matter with the Commission have failed, leaving Senator Migden no choice but to bring this action. With less than three months to go before the election, and important campaign deadlines to meet, Senator Migden's First Amendment rights must be protected now by preliminarily enjoining the FPPC from enforcing section 89519 against her pending a final resolution of the statute's constitutionality. As Chief Justice Roberts recently wrote:

> [T]he First Amendment requires us to err on the side of protecting political speech rather than suppressing it.
>
> *Federal Election Comm'n v. Wisconsin Right to Life, Inc.*, __ U.S. __, 127 S. Ct. 2652, 2659 (2007).

BACKGROUND

A. Relevant Provisions of the Political Reform Act of 1974

The Political Reform Act of 1974, California Government Code §§ 81000 *et seq.* ("PRA"), regulates campaign contributions to and expenditures by candidates for state office. It also establishes the requirements for reporting contributions and expenditures. The PRA permits a candidate to transfer excess funds that remain after an election to a campaign committee established for

a future election of that same candidate to the same or any different office. Cal. Gov't Code § 85306.[1] Section 85306 does not set a deadline by which such "intra-candidate" transfers must occur.

In November 2000, the voters approved Proposition 34 which, among other things, amended the PRA to impose campaign contribution limits on candidates who run for state office at an election occurring on or after January 1, 2001.[2] The drafters of Proposition 34 were aware of a decision by the U.S. Court of Appeals for the Ninth Circuit striking down an earlier initiative statute that attempted to limit candidates' ability to carry over funds raised prior to the imposition of contribution limits to a committee for an election in which contribution limits would apply. *See Service Employees Int'l Union v. Fair Political Practices Comm'n*, 955 F.2d 1312, 1323 (9th Cir. 1992), *cert. denied*, 505 U.S. 1230 (1992) ("*SEIU*"). They therefore included in Proposition 34 a provision allowing candidates for state office to carry over funds raised prior to January 1, 2001 (that were not subject to contribution limits) into a campaign committee established for a future election "without attributing the funds to specific contributors." Cal. Gov't Code § 85306(b). This meant that candidates who had on hand funds raised prior to the advent of Proposition 34's contribution limits could use those funds in a future election campaign even though the funds were raised without regard to any contribution limit, making the "pre-Proposition 34 funds," as they were called, especially valuable. After an initial period of confusion over how it would approach the handling of pre-Proposition 34 funds, the FPPC eventually issued a regulation decreeing that there would be no limit on the number of times a candidate could transfer those pre-Proposition 34 funds to another campaign committee established by that same candidate for a future election. Cal. Code Regs. tit. 2, § 18530.2(a).

The PRA, however, contains an additional provision that governs intra-candidate transfers of campaign funds regardless of whether those funds were raised prior to or after the advent

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[1] State candidates must maintain a separate campaign committee and bank account for each office they seek. Cal. Gov't Code § 85201(a). All campaign expenditures must be made from the committee and bank account set up for that particular election. *Id.* § 85201(e).

[2] Proposition 34's contribution limits did not apply to candidates for statewide office (e.g., Governor, Attorney General) until after the November, 2002 election. 2001 Stat. ch. 241, § 18; Prop. 34, § 83 (Nov. 7, 2000).

of Proposition 34's contribution limits. Government Code section 89519, known as the "surplus funds" statute, provides that campaign funds become "surplus" when a successful candidate leaves the term of office for which he or she was elected, or at the end of the first campaign reporting period following a candidate's defeat. Once campaign funds become surplus, they can only be used for the limited purposes specified by the statute, and cannot be used for any future election campaign. The surplus funds statute reads:

> (a) Upon leaving any elected office, or at the end of the postelection reporting period following the defeat of a candidate for elective office, whichever occurs last, campaign funds raised after January 1, 1989, under the control of the former candidate or elected officer shall be considered surplus campaign funds and shall be disclosed pursuant to Chapter 4 (commencing with Section 84100).
>
> (b) Surplus campaign funds shall be used only for the following purposes:
>
> (1) The payment of outstanding campaign debts or elected officer's expenses.
>
> (2) The repayment of contributions.
>
> (3) Donations to any bona fide charitable, educational, civic, religious, or similar tax-exempt, nonprofit organization, where no substantial part of the proceeds will have a material financial effect on the former candidate or elected officer, any member of his or her immediate family, or his or her campaign treasurer.
>
> (4) Contributions to a political party committee, provided the campaign funds are not used to support or oppose candidates for elective office. However, the campaign funds may be used by a political party committee to conduct partisan voter registration, partisan get-out-the-vote activities, and slate mailers as that term is defined in Section 82048.3.
>
> (5) Contributions to support or oppose any candidate for federal office, any candidate for elective office in a state other than California, or any ballot measure.
>
> (6) The payment for professional services reasonably required by the committee to assist in the performance of its administrative functions, including payment for attorney's fees for litigation which arises directly out of a candidate's or elected officer's activities, duties, or status as a candidate or elected officer, including, but not limited to, an action to enjoin defamation, defense of an action brought of a violation of state or local campaign, disclosure, or election laws, and an action from an election contest or recount.

> (c) For purposes of this section, the payment for, or the reimbursement to the state of, the costs of installing and monitoring an electronic security system in the home or office, or both, of a candidate or elected officer who has received threats to his or her physical safety shall be deemed an outstanding campaign debt or elected officer's expense. . . .
>
> Cal. Gov't Code § 89519.

Campaign activities, including activities undertaken in connection with a future run for office, are notably absent from the statute's detailed list of uses to which surplus funds can be put. As a result, an officeholder can transfer funds leftover from one campaign to another campaign committee for future office but only before the official leaves the office for which his or her original campaign committee was established. *See* Cal. Code Regs. tit. 2, § 18951(a)(1) ("An incumbent state candidate who wishes to use funds for a future election must transfer those funds to a new committee for a future election no later than [the date on which the incumbent leaves the elective office for which the funds were raised]."). After that date, the funds become surplus and cannot be transferred to a future campaign committee for the same candidate because section 89519 does not allow surplus funds to be used for the candidate's campaign activities.

B. Senator Carole Migden and Her Campaign Committees

Senator Migden first ran successfully for election to the California State Assembly in 1996; she won re-election to that office in 1998 and 2000. Carole Migden Decl., ¶ 1. Senator Migden's 1998 and 2000 campaigns were financed through the Re-Elect Assemblywoman Carole Migden Committee (the "Assembly Committee"). Roger Sanders Decl., ¶ 1. Senator Migden received more money in lawful campaign contributions than she wound up spending on her Assembly elections. Migden Decl., ¶ 2. Thus at the end of December 2000, with her re-election successfully behind her, Senator Migden had approximately $900,000 remaining in her Assembly Committee. *Id.*, ¶ 2; Sanders Decl., ¶ 2.

The funds remaining in the Assembly Committee as of December 2000 were raised before the advent of contribution limits. Migden Decl., ¶ 2. In November 2000, the voters passed Proposition 34, which imposed contribution limits on state candidates for elections taking place on or after January 2001. Cal. Gov't Code § 85301; 2001 Stat. ch. 241, § 18; Prop. 34, § 83 (Nov. 7, 2000).

As discussed above, Proposition 34 contains a provision that allows state legislative candidates to use any campaign funds they had on hand in December 2000 in future state elections without regard to contribution limits. Cal. Gov't Code § 85306(b). Those "pre-Proposition 34 funds" thus are especially valuable. Migden Decl., ¶ 2.

Knowing this, Senator Migden wanted to ensure that she could use her pre-Proposition 34 funds for future elections. Migden Decl., ¶ 2. She instructed Roger Sanders, the volunteer treasurer of her Assembly Committee, to take all necessary steps to ensure that she could use her pre-Proposition 34 funds for a future election. *Id.*, ¶ 2; Sanders Decl., ¶ 2.

At that time, Proposition 34 had just been passed by the voters and many aspects of its implementation remained unclear. In particular, the FPPC had not yet decided whether or how incumbent officeholders like Senator Migden should segregate their pre-Proposition 34 funds, whether those funds could be transferred to a future campaign once or multiple times, and whether current campaign expenditures would be considered coming first from "old" funds or "new" funds. Sanders Decl., ¶ 4. Based on Senator Migden's instructions, Mr. Sanders took steps he believed would permit Senator Migden to use her pre-Proposition 34 funds for future elections. *Id.*, ¶ 5. Mr. Sanders set aside $900,000 in pre-Proposition 34 money that remained in the Assembly Committee, and in March 2001 transferred that money from the Assembly Committee's checking account to a separate certificate of deposit account at Wells Fargo Bank. *Id.*, ¶ 6.

The Wells Fargo CD matured in March 2002. By then Senator Migden was actively seeking election to the state Board of Equalization, but she did not need the pre-Proposition 34 funds to do so, because the Democratic Primary election for that seat was uncontested. Migden Decl., ¶ 4. Thus Mr. Sanders kept the money segregated, this time placing it in a separate interest-bearing account at Sterling Bank. Sanders Decl., ¶ 8. Although there was some confusion with the bank over how it named that separate account, and some confusion over where and how to report the funds held in that separate account, Mr. Sanders believed he had done everything necessary to ensure that Senator Migden would be able to use her pre-Proposition 34 funds on a future election campaign. *Id.*, ¶¶ 8-9.

Senator Migden too was confident that the funds would be available for use in a future election. Migden Decl., ¶ 4. As Roger Sanders declares,

> I am aware that surplus funds cannot be used for a future election. At no time was I concerned about the $900,000 in pre-Proposition 34 money being deemed "surplus" because that money had been transferred out of the Assembly Committee checking account long before Senator Migden left office, and into a separate account established for a future election. I have always assured Senator Migden that she could use the funds for a future election.
>
> Sanders Decl., ¶ 9.

As of March 2008, $647,000 of the pre-Proposition 34 funds remains unspent. Senator Migden currently is running in a highly-competitive race for re-election to her Senate seat. Migden Decl., ¶ 7; Richard Ross Decl., ¶ 3. The 3rd Senate District encompasses Marin County and parts of Sonoma and San Francisco counties. The district is heavily Democratic, making the June 3, 2008 primary election the critical race in the election cycle. Migden Decl., ¶ 7. Senator Migden is facing three well-known challengers: current state Assemblymember Mark Leno; former state Senator Joe Nation; and San Francisco Police Commissioner Joe Alioto Veronese. The race is, and will be, expensive and it is critical that Senator Migden be permitted to use all of her campaign funds to effectively communicate with the voters of the district. *Id.*, ¶ 7-8; Ross Decl., ¶ 5. If allowed to do so, Senator Migden would use her pre-Proposition 34 funds to pay for radio, cable television, mail and other paid advertisements, get-out-the vote operations, and other campaign needs, all of which will cost significant sums of money to adequately cover her wide-ranging Senate district. Migden Decl., ¶ 7; Ross Decl., ¶ 5. Senator Migden's ability to spend those campaign funds is critical to her ability to succeed in the June primary election. Migden Decl., ¶ 8; Ross Decl., ¶ 7. She cannot make up in fundraising between now and the election anywhere near the $647,000 she currently has on hand. Migden Decl., ¶ 7.

Senator Migden needs to know now whether those funds will be available to spend on her campaign starting in April. Although the election is not until June, absentee balloting – which in this Senate district accounts for 49% of the voters – begins one month earlier, ratcheting up all the campaign deadlines. Ross Dec., ¶ 4. As Senator Migden's campaign consultant describes,

> Decisions about the allocation of campaign funds must be made soon in order to ensure that the campaign communications can be produced and disseminated in a timely fashion. . . . Because we plan to send mail to absentee voters, we need to begin printing in early April. . . . I would contract with the stations beginning in March to ensure that I had sufficient cable and radio time reserved in the critical weeks before the June primary. With a budget of $900,000, I would have sufficient funds to ensure that I could change my strategy if necessary in the final few weeks, for instance by sending more targeted mail to areas. I also would have the funding to conduct polling if necessary to help fashion our campaign communications to those issues that are of particular interest to the voters in the district.
>
> * * *
>
> [¶] If I do not know by the end of March whether Senator Migden has access to the $647,000 in contested funds, then I will have no choice but to plan a campaign with a much smaller budget. In that case I will scale back in particular paid media, including mail. This will present the campaign with a difficult choice: send mail early to reach absentee voters or wait until closer to the date of the election to reach voters who go to the polls. In either case, it will not be sufficient to deliver Senator Migden's message to the voters. This would directly and negatively affect Senator Migden's ability to communicate with all the voters in her large district. Even if I were to find out in May that Senator Migden can use the funds, it likely would be impossible to gear up quickly enough to produce and send campaign mail, and to buy sufficient time on radio and cable. Moreover, by then many absentee voters would have received and returned their ballots, and *Senator Migden would have lost forever the ability to persuade them.*
>
> Ross Decl., ¶¶ 9, 11 (emphasis added).

C. <u>The Fair Political Practices Commission</u>

On October 29, 2007, the FPPC's Enforcement Division informed Senator Migden that she could not transfer her pre-Proposition 34 funds to her 2008 Committee for use in the June primary because, in its view, those funds became "surplus" as of December 2002 when she left her Assembly office. James C. Harrison Decl., Ex. A. The FPPC's position is based on its view that, although the funds were transferred from the Assembly Committee bank account to a separate certificate of deposit account prior to the December 2002 deadline, the transfer was not effective for purposes of section 89519 because the funds continued to be reported on the Assembly Committee campaign reports. *Id.*, ¶ 3. The funds were erroneously reported on the Assembly Committee campaign reports due to a misunderstanding on the part of the volunteer treasurer who prepared the campaign reports. Sanders Decl., ¶ 7.

Upon receipt of the FPPC's letter, Senator Migden attempted to persuade the FPPC that she should be allowed to use the pre-Proposition 34 funds on her current election campaign. Harrison Decl., ¶ 3. Unable to persuade the FPPC that the pre-Proposition 34 funds had not become surplus, Senator Migden pointed to an FPPC opinion that permitted state Senator Ellen Corbett to use surplus funds on a current election campaign even though she had not complied with the statutory deadline. *Id.* In that case, Senator Corbett had approximately $100,000 in funds that she had raised before Proposition 34 took effect. She desired to use them in her 2006 senate election, but had failed to transfer them before she left the Assembly, the office for which the funds had been raised. Notwithstanding her failure to comply with the deadline in Government Code section 89519, the FPPC permitted Senator Corbett to use her funds in her 2006 election. *In re Pirayou*, 19 FPPC Opn. 1 (2006), Harrison Decl., Ex. B.

Despite the similarities between the two situations, the FPPC refused Senator Migden's request for similar treatment. *Id.*, ¶ 3. Senator Migden also provided the FPPC with a citation to a California Attorney General opinion that the surplus funds statute, upon which the FPPC relies here, acts as an unconstitutional expenditure limitation. *Id.*, ¶ 3, Ex. C. Nonetheless, on or about February 15, 2008, the FPPC notified Senator Migden that it would not change its position.

Section 89519 as applied by the FPPC severely and directly limits the amount of political speech that Senator Migden can engage in during the June 3, 2008 primary election. Without action by this court to enjoin the FPPC from enforcing section 89519 against Senator Migden, she will be severely hampered in her ability to communicate effectively with voters in her district and will be at a disadvantage during her re-election campaign. Migden Decl., ¶ 8; Ross Decl., ¶¶ 10, 11. Thus, Senator Migden has suffered and will continue to suffer irreparable injury as a result of the FPPC's conduct. The harm will only increase in the coming months as the June 3, 2008 primary election draws nearer. Plaintiffs have exhausted their attempts to resolve the matter informally with the FPPC, and have no plain, speedy or adequate remedy at law.

ARGUMENT

I.

PLAINTIFFS MEET THE STANDARDS FOR ISSUANCE OF A PRELIMINARY INJUNCTION

A party seeking a preliminary injunction must show "either (1) a combination of probable success on the merits and the *possibility* of irreparable harm; or (2) that serious questions are raised and the balance of hardships tips in its favor." *Sammartano v. First Judicial Dist. Ct.*, 303 F.3d 959, 965 (9th Cir. 2002) (internal quotes omitted) (emphasis added). In addition, the impact on the public interest should be considered in balancing the hardships to the parties. *Id.* at 965, 974 (citation omitted). "Because the test for granting a preliminary injunction is 'a continuum in which the required showing of harm varies inversely with the required showing of meritoriousness,' when the harm claimed is a serious infringement on core expressive freedoms, a plaintiff is entitled to an injunction even on a lesser showing of meritoriousness." *Id.* at 973-74 (quoting *San Diego Comm. Against Registration & the Draft v. Governing Bd. of Grossmont Union High Sch. Dist.*, 790 F.2d 1471, 1473 n.3 (9th Cir. 1986)). Plaintiffs meet either iteration of the test with ease.

II.

PLAINTIFFS HAVE A HIGH LIKELIHOOD OF SUCCESS ON THE MERITS AND WILL SUFFER IRREPARABLE INJURY IF AN INJUNCTION DOES NOT ISSUE

A. Plaintiffs Are Likely to Succeed on the Merits of Their Constitutional Claims

1. The surplus funds provision is an expenditure limit subject to strict scrutiny

The United States Supreme Court repeatedly has stated that a candidate's expenditures on her own campaign are protected by her constitutional right of free speech.

> [C]ontribution and expenditure limitations operate in an area of the most fundamental First Amendment activities. Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people."

> [Citation.] . . . As the Court observed in *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272, 91 S. Ct. 621, 625, 28 L.Ed.2d 35 (1971), "it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office."
>
> *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976) (citations omitted).

In *Buckley v. Valeo*, the United States Supreme Court distinguished a contribution limit from an expenditure limit for purposes of constitutional analysis. While a contribution limit is subject to a less rigorous standard of review because the act of giving "entails only a marginal restriction upon the contributor's ability to engage in free communication" (*id.* at 20), an expenditure limit, by contrast, involves a direct restraint on speech:

> A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money.
>
> *Id.* at 19.

The constitutionality of an expenditure limit thus "turns on whether the governmental interests advanced in its support satisfy the exacting scrutiny applicable to limitations on core First Amendment rights of political expression." *Id.* at 44-45. As the U.S. Court of Appeals for the Sixth Circuit has explained, strict scrutiny applies regardless of the type of expenditure limitation at issue:

> [A]ny expenditure limitation – irrespective of the kind of election involved (state, federal, judicial, non-judicial, civil penalties, criminal penalties, etc.), "[i]n a republic where the people are sovereign, [and] the ability of the citizenry to make informed choices among candidates for office is essential," must be narrowly tailored and serve a compelling government interest in order to infringe upon a "most fundamental First Amendment activity."
>
> *Suster v. Marshall*, 149 F.3d 523, 529 (6th Cir. 1998), *cert. denied*, 525 U.S. 1114 (1999) (quoting *Buckley*, 424 U.S. at 14-15).

The Supreme Court for thirty years "has repeatedly adhered to *Buckley's* constraints, including those on expenditure limits." *Randall v. Sorrell*, 548 U.S. 230,126 S. Ct. 2479, 2488 (2006)

(citations omitted). Expenditure limits therefore "are subject to strict scrutiny and will be upheld only if they are 'narrowly tailored to serve a compelling state interest.'" *SEIU*, 955 F.2d at 1322 (quoting *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 657 (1990)). Put otherwise, because limits on campaign expenditures directly burden core First Amendment activity, they almost always are found to be unconstitutional. *See Randall*, 126 S. Ct. at 2488-89 and cases cited therein.

Under established precedent in the Ninth Circuit, section 89519 is analyzed as an expenditure limit because it restricts Senator Migden's ability to transfer her pre-Proposition 34 funds from her previous election committees to her 2008 Committee, where they could be spent on her June 2008 primary election campaign.[3] In *SEIU*, the Ninth Circuit affirmed a district court ruling striking down various aspects of Proposition 73, a campaign finance scheme approved by California voters in 1988. Proposition 73 established campaign contribution limits for state candidates, and prohibited those candidates from transferring funds from one candidate committee to another ("intra-candidate" transfers), or from spending funds raised prior to the imposition of the new contribution limits. Among other things, the district court struck down as unconstitutional Proposition 73's intra-candidate expenditure ban. *Service Employees Int'l Union v. Fair Political Practices Comm'n*, 747 F. Supp. 580, 591 (E.D. Cal. 1990), *aff'd*, 955 F.2d 1312 (9th Cir. 1992). In affirming that decision, the Ninth Circuit explained why intra-candidate bans operate as expenditure limits: "[A] ban on intra-candidate transfers operates as an expenditure limitation because it limits the purposes for which money raised by a candidate may be spent." *SEIU*, 955 F.2d at 1322 (footnote omitted).

The Ninth Circuit, like the district court, rejected the FPPC's argument that the intra-candidate transfer ban was justified by a compelling state interest in protecting contributors from being misled as to the uses to which their contributions would be put, and to keep funds from being raised for one office and spent on another:

> Even if we were to recognize this to be a compelling state interest, we would invalidate the ban as violative of the First Amendment because it is not narrowly-tailored. We agree with the district court that this

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[3] The FPPC requires that candidates make all expenditures relating to a particular election from the campaign committee established for that election. Cal. Gov't Code § 85201.

> interest in ensuring that contributors are not misled could be served simply by requiring candidates to inform contributors that their contributions might be spent on other races. [Citation.] Concerns about the unintended use of contributors' money can be met "by means far more narrowly tailored and less burdensome than [a] restriction on direct expenditures: simply requiring that contributors be informed that their money may be used for such a purpose." [Citation.] We hold, therefore, that the intra-candidate transfer ban fails the narrowly-tailored prong of the strict scrutiny test.
>
> *Id.* at 1322 (citations omitted).

Likewise, in *Shrink Missouri Gov't PAC v. Maupin*, 71 F.3d 1422, 1428 (8th Cir. 1995), *cert. denied*, 518 U.S. 1033 (1996), the court struck down Missouri's "spend down" provision, which was designed, like California's section 89519, to limit the uses to which leftover campaign funds could be put. Missouri's spend down provision required a candidate, within 90 days after an election, to "turn over any excess funds, 'except for an amount no greater than ten times the individual contribution limit' for the office sought, to the Missouri Ethics Commission or to contributors." *Id.* at 1427 (citation omitted). The Sixth Circuit held that the spend down provision, because it restricted candidates from spending excess campaign funds for a future election, "limits the quantity of a candidate's speech in future elections. We note that this effect is identical to the effect of the expenditure limits addressed earlier in this opinion except that the impact of the provision is postponed to future elections. . . . [T]he provision must be subjected to strict scrutiny." *Id.* at 1428. After reviewing each of the State's purported reasons for the provision, the court had little trouble striking it down as an impermissible expenditure limit. *Id.* at 1427-29. The court rejected, among other rationales, the idea that the state had a compelling interest in having candidates spend funds in the same election for which those funds were raised:

> Surely the contributor's political free speech interests are not well served if a candidate is compelled (1) to waste campaign contributions on unnecessary speech (in order to spend down the campaign's accumulated assets) or (2) to turn over those contributions to the Missouri Ethics Commission or return them to contributors.
>
> *Id.* at 1428.

Finally, in 1995, California Attorney General Daniel Lungren opined that the very provision the FPPC relies upon here to prohibit Senator Migden from spending her pre-Proposition 34

funds on her 2008 election is unconstitutional. After discussing the *SEIU* decision, the Attorney General concluded:

> Although the Ninth Circuit and district court addressed only the use of campaign funds and not "surplus campaign funds," the rationale of these decisions would apply equally to the latter. . . . In effect section 89519 bans the use of surplus campaign funds when an officeholder seeks to run for a different office. Such prohibition affects an officeholder's quantity of political expression during his second campaign. The purpose of the statute, to prevent campaign contributors from being misled, may be more narrowly addressed by, for example, a disclosure requirement.
>
> 78 Ops. Cal. Atty. Gen. 266 (1995), 1995 WL 475548, *3 (footnote omitted).

In short, precedent strongly weighs toward a finding that section 89519 is unconstitutional.

2. Section 89519's intra-candidate transfer ban does not meet strict scrutiny

This is a First Amendment case and as such the FPPC, not plaintiffs, carries the burden of proof for a preliminary injunction. *Wisconsin Right to Life, Inc.*, 127 S. Ct. at 2664; *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006). To prevail, the FPPC must prove that the intra-candidate transfer ban in section 89519 meets strict scrutiny: the ban must serve a compelling state interest *and* be narrowly tailored to meet that interest. *Id.*; *SEIU*, 955 F.2d at 1322. As shown below, all of the possible justifications on which the FPPC could rely fail either one or both prongs of the strict scrutiny test.

Before reviewing those justifications, however, it is important to bear in mind exactly what the surplus fund provision in section 89519 does and does not do. The PRA explicitly permits a candidate to transfer leftover funds from one campaign to a future campaign of the same candidate. Cal. Gov't Code § 85306. Section 85306 does not set a deadline by which such a transfer must occur. The PRA also permits a candidate for state office to use funds that he or she may have raised prior to the January 1, 2001 effective date of Proposition 34 for future campaigns without limitation. *Id.* § 85306(b); Cal. Code Regs. tit. 2, § 18530.2(a). Pre-Proposition 34 funds can be used at any point in the future, and there is no time limit by which they must be spent. Cal. Code Regs. tit. 2, § 18530.2(a). Thus, under these laws, including campaign finance reform legislation adopted by the voters,

Senator Migden would be entitled to use her $647,000 in remaining pre-Proposition 34 funds for her 2008 Senate race.

The FPPC, however, has taken the position that the Act's surplus funds provision, section 89519, must be superimposed over section 85306, thereby creating an arbitrary deadline by which candidates must transfer funds from old committees in order to use them for a future campaign.[4] As a result, a person holding state elected office can transfer any funds remaining in his or her campaign committee to another campaign committee of that same person for a future election, but only before the officeholder finishes the term of office for which the original campaign committee was established. Cal. Code Regs. tit. 2, § 18951(a)(1). The FPPC contends that because Senator Migden's pre-Proposition 34 funds were raised when she was in the Assembly, she was required to transfer those funds to a new committee by December 2002, when she left her Assembly office, or lose forever the right to use those funds for future office.

This puts the FPPC in an untenable position, for the transfer ban cannot be justified as a way of preventing the circumvention of contribution limits because the Act expressly permits candidates to transfer pre-Proposition 34 funds (funds raised before contribution limits were in place) without limit. It cannot be justified as a means of preventing candidates from accumulating "warchests" by amassing funds from previous campaigns because the Act permits candidates to transfer old campaign funds from one committee to the next without attribution and without limit. And it cannot be justified by the goal of compelling candidates to spend down old campaign funds quickly because the Act permits candidates to transfer old campaign funds to future elections an unlimited number of times and for as long as funds remain. Rather, what the state has to justify is not a total ban on use of funds raised for a prior election, but an arbitrary time deadline by which the candidate must transfer those funds. The state cannot possibly articulate a compelling state interest in allowing the use of prior funds only if they are transferred within section 89519's arbitrary deadline.

With that in mind, we review the possible justifications for section 89519.

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[4] Section 89519 states that campaign funds become "surplus" either upon an officeholder leaving office or at the end of the post-election reporting period for a defeated candidate, whichever is later.

a. The ban cannot be justified as leveling the playing field

The FPPC may argue that section 89519 is needed in order to limit candidates from amassing large "warchests" from previous campaigns to be used in future elections. That rationale fails both prongs of the strict scrutiny test. First, the Supreme Court has squarely rejected the notion that equalizing the relative ability of candidates to influence the outcome of elections by equalizing their spending comports with the Constitution. *Buckley*, 424 U.S. at 48-49 (government may not "restrict the speech of some elements of our society in order to enhance the relative voice of others"); *see also Arizona Right to Life PAC v. Bayless*, 320 F.3d 1002, 1014 (9th Cir. 2002). Nor does the government have a compelling state interest in restraining the costs of election campaigns. *Buckley*, 424 U.S. at 57 (the growth in campaign costs "provides no basis for governmental restrictions on the quantity of campaign spending").

Second, even if California had a compelling state interest in leveling the playing field, section 89519 is not narrowly tailored to meet that interest because the Act *permits* candidates to transfer "warchests" of previously raised funds to future elections, provided only that the time deadlines of section 89519 are met. If the state truly has an interest in preventing candidates from amassing large sums of money in previous campaigns and using those funds to jump start a new campaign for office, then it has failed miserably at the task. Candidates easily can raise significant sums of money over the course of a political career and use that money for a future run for office.

One example is former state Treasurer Phil Angelides, who accumulated over $8 million in unspent pre-Proposition 34 funds in his Treasurer committee. When Mr. Angelides decided to run in the 2006 primary election to secure the democratic nomination for governor, he transferred that $8 million in unspent Treasurer committee funds to a new committee established for the governor's race. Harrison Decl., ¶ 6; Exs. D and E.

Funds can be transferred in this manner and used for a new election campaign even if they were not raised prior to the advent of Proposition 34. Indeed, it is not always possible to tell whether the transferred funds are pre- or post-Proposition 34. For example, current Board of Equalization member Bill Leonard opened his "Friends of Bill Leonard Committee," established for

his 2006 re-election campaign, by transferring $50,000 in unspent funds from his first BOE committee. Harrison Decl., ¶ 7, Ex. F. In 2003, he transferred another $100,000 from his first BOE committee to the Friends Committee. *Id.*, ¶ 7; Ex. G. Because Mr. Leonard has held various elected state offices since 1978, transferring money from one campaign committee to the next, it is impossible to tell simply from the face of the campaign reports when that $150,000 originally was raised.

If it is acceptable to use such funds if they are transferred the day before the deadline, one is hard pressed to articulate why it should not be acceptable to use those same funds if transferred two days later. Similarly, if the state has an interest in limiting the use of such funds, that interest is not met by a law that so easily allows evasion of the limit simply by transferring the funds prior to the statutory deadline.

b. <u>The ban cannot be justified as a spend-down provision</u>

This District and the Ninth Circuit also have rejected the "notion that contributions given for one office ought not be diverted to another . . . ."

> This "trust" theory, which suggests donations are premised upon the office rather than the candidate, may, of course, sometimes be true; on the other hand, as evidence in this trial demonstrated, it is sometimes false. More to the point, it is clear that to the extent the provision is intended to insure truth in soliciting, a narrower and more efficacious means is readily at hand.
>
> *Service Employees Int'l Union*, 747 F. Supp. at 591 (footnote omitted).

See also SEIU, 955 F.2d at 1322 ("We agree with the district court that this interest in ensuring that contributors are not misled could be served simply by requiring candidates to inform contributors that their contributions might be spent on other races."). They are not alone in this regard; the Eighth Circuit also has rejected the argument that the government has a compelling interest in requiring that funds be spent on the election for which they originally were raised. *Shrink Missouri Gov't PAC*, 71 F.3d at 1427-29 (rejecting state's argument that its "spend-down" provision serves a compelling state interest).

Any interest the state has in ensuring that campaign funds are spent in a timely manner already is accomplished by a less restrictive means. After Proposition 34 was approved, the FPPC

determined that it should, for the first time, establish rules requiring that old campaign committees be closed within a time certain after the candidate leaves office or is defeated. Cal. Code Regs. tit. 2, § 18404.1. Those rules have numerous safeguards, however, that allow candidates to petition the FPPC Executive Director for permission to keep open a committee, and to appeal to the FPPC Chairman if the Executive Director rules against them. *Id.* § 18404.1(f) & (g). Moreover, although the Executive Director is required to consider certain enumerated factors in reaching a decision whether to allow a committee to remain open, he or she also is allowed to consider "[o]ther good cause shown." *Id.* § 18404.1(f)(3). Terminated committees also can be reopened for any one of certain enumerated reasons or "[f]or any other good cause shown that would further the disclosure requirements or contribution limits of this title." *Id.* § 18404.1(i)(5). This committee termination regulation thus accomplishes the same purposes as the surplus funds statute, but with greater flexibility and with safeguards to prevent unnecessary infringement of a candidate's rights.[5]

In any event, as discussed above, the Act *permits* candidates to hold on to their old campaign funds indefinitely, provided the funds are timely transferred to another committee established for a future election. Thus, even if the state had a compelling interest in requiring that campaign funds be spent by a certain time, section 89519 is not narrowly tailored to meet that interest because it allows pre-Proposition 34 campaign funds to accumulate indefinitely so long as they are timely shuffled from one committee to another.

c. The ban cannot be justified as preventing corruption or the appearance of corruption

The prevention of corruption or the appearance of corruption has been recognized as a legitimate state interest in the context of campaign contribution limits. *Buckley*, 424 U.S. at 27. The concern there, however, is that a contributor may proffer a large contribution to improperly sway a candidate's decisions. *Id.* at 28. Expenditures, by contrast, are made by the candidate directly and

[5] Depending on its application, of course, the committee termination requirement may itself raise First Amendment concerns.

have little if any nexus to the state's interest in preventing corruption. *Suster*, 149 F.3d at 532.[6] Here, the link between when the contribution was made, and any undue influence on the candidate, is by definition attenuated because section 89519 is concerned only with funds that remain unspent long after the election for which they were raised. Thus, if there were a concern about the corruptive influence of a large contribution, that concern would have been at its zenith when the contribution originally was made, and not when it is spent many months or years later. Section 89519, therefore, is not narrowly tailored to achieve this goal. In any event, as the Eighth Circuit has noted, one is "hard-pressed to discern how the interests of good government could possibly be served by campaign expenditure laws that necessarily have the effect of limiting the quantity of political speech in which candidates for public office are allowed to engage." *Shrink Missouri Gov't PAC*, 71 F.3d at 1426 (citing *Buckley*, 424 U.S. at 55-57).

d. The ban cannot be justified as a means of preventing circumvention of contribution limits

The FPPC cannot legitimately argue that section 89519's time deadline for transferring left over campaign funds is justified by the government's interest in preventing the circumvention of Proposition 34's contribution limits. The PRA, as modified by Proposition 34, specifically permits pre-Proposition 34 funds to be carried over for use in future elections without regard to those contribution limits. Cal. Gov't Code § 85306. Thus, the state explicitly allows the mixing of funds raised prior to and after imposition of contribution limits, undermining any interest it might have in keeping the funds separate to guard against circumvention of the contribution limits.

e. The ban cannot be justified on the grounds it increases transparency

Recently, the FPPC has floated an additional justification for section 89519. In response to Senator Ellen Corbett's request for an exception from section 89519, the FPPC stated that

[6] The court in *Suster* upheld the district court's preliminary injunction against a judicial canon which set a limit on campaign expenditures in judicial elections, but also upheld the district court's refusal to preliminarily enjoin a canon that prohibited the use of funds raised in a previous, nonjudicial campaign. In so doing, the Eighth Circuit went to great pains to distinguish the unique aspects of judicial campaigns and noted that the statute was narrowly tailored to those campaigns and did not, for example, prohibit using funds raised in one judicial campaign in another judicial campaign, or from using previously-raised funds in a subsequent non-judicial campaign. *Suster*, 149 F.3d at 534 (citing *SEIU*, 955 F.2d at 1315, and *Shrink Missouri Gov't PAC*, 71 F.3d at 1427-28).

section 89519's deadline "ensures candidates do not secretly amass campaign funds to finance a future campaign." *In re Pirayou*, 19 FPPC Opn. 1, 7. The Commission went on:

> A timely transfer of the funds permits candidates to express their intention to use collected contributions for a future campaign and it avails the public of information regarding the candidate's campaign strategies.
>
> *Id.*

There are several problems with relying on that rationale to meet strict scrutiny. First, it has never been advanced, let alone accepted, as a compelling enough interest to justify a severe burden on candidates' First Amendment rights, and it is doubtful whether some amorphous "need" to inform the public about a candidate's strategy is an interest compelling enough to justify the severe restriction it places on the amount of speech in which candidates can engage. In the thirty years since *Buckley*, the Supreme Court has found only two interests consistently compelling enough to warrant intrusion on the First Amendment rights of candidates: curbing corruption or the appearance of corruption. *Wisconsin Right to Life, Inc.*, 127 S. Ct. at 2672 (quoting *Buckley v. Valeo*, 424 U.S. at 45) ("This Court has long recognized 'the governmental interest in preventing corruption and the appearance of corruption' in election campaigns.").[7]

Moreover, even if this could be considered a compelling state interest, it is met by other provisions of the PRA: California already requires candidates to file a "statement of intention" disclosing their intent to run for a particular office before they are allowed to raise or spend any significant amount of funds on a campaign for that office. Cal. Gov't Code § 85200. Moreover, candidates must report all expenditures of campaign funds on detailed campaign reports that are readily accessible on-line through the California Secretary of State's web site. *Id.* § 84211. In any event, there is no requirement that the funds actually be spent on the campaign for which they initially are transferred. The funds can be transferred an unlimited number of times, and so long as they remain

[7] In some circumstances, the Court also recognizes the governmental interest in preventing the circumvention of campaign contribution limits, although "expenditure limitations 'cannot be sustained simply by invoking the interest in maximizing the effectiveness of the less intrusive contribution limitations.'" *Wisconsin Right to Life, Inc.*, 127 S. Ct. at 2672 (citing *Buckley*, 424 U.S. at 44).

unspent, they remain available for some future, unnamed election. *Id.* § 85306(b); Cal. Code Regs. tit. 2, § 18530.2. Thus, section 89519 does nothing to guarantee that the public knows the purpose to which the funds ultimately will be put.

f. The ban cannot be justified as a narrowly tailored restriction that advances a compelling state interest when the State selectively enforces the ban

Finally, the FPPC's inconsistent enforcement of the transfer deadline in section 89519 thoroughly undermines any suggestion that the ban serves a compelling state interest. If there is a compelling state interest in having candidates transfer surplus funds from one account to another by a specific date, then Senator Corbett should not have been granted a waiver of that very deadline. *In re Pirayou*, 19 FPPC Opn. 1. If the FPPC believes the deadline can or should be waived at times, the deadline can hardly be said to be compelling. The truth, of course, is that the deadline is a technical rule that severely restricts political speech but at the same time does not advance an important goal or policy.

In sum, the FPPC has applied the surplus funds statute to limit Senator Migden's ability to spend funds she raised but did not need for an earlier election on an upcoming election in which every penny counts. There can be no question but that the surplus funds statute plainly operates as an expenditure limit because it precludes Senator Migden from spending those funds on her June 2008 primary election campaign. There is no compelling state interest in restricting Senator Migden's ability to apply those funds toward her re-election campaign. Even if the state could articulate an interest in restricting Senator Migden's speech in this manner, the statute is not narrowly tailored to do so because it allows others to spend their excess campaign funds in precisely this manner by the mere happenstance of whether they transferred the funds to a new campaign committee before the time deadline set forth in the statute, or received a pass from the FPPC for failing to do so.

B. Plaintiffs Will Suffer Irreparable Injury if the Surplus Funds Provision is Not Enjoined

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Thus,

> even if the merits of the constitutional claim were not "clearly established" at this early stage in the litigation the fact that a case raises

> serious First Amendment questions compels a finding that there exists "the potential for irreparable injury, or that at the very least the balance of hardships tips sharply in [favor of the party alleging First Amendment injury]."
>
> *Sammartano*, 303 F.3d at 973 (citations omitted).

The irreparable injury is the same whether pure speech or campaign requirements are at issue. *See Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 91-92 (1982) (upholding decision in which district court originally issued temporary restraining order barring enforcement of campaign finance disclosure requirements). Other constitutionally suspect campaign finance laws have been preliminarily enjoined to avoid further injury. *See, e.g., SEIU*, 955 F.2d at 1315 n.4 (Proposition 73 enjoined from going into effect during appeal); *see also Homans v. City of Albuquerque*, 264 F.3d 1240, 1243-45 (10th Cir. 2001) (district court issued temporary restraining order and appellate motions panel issued preliminary injunction to enjoin enforcement of city election expenditure limit against mayoral candidate; *Shrink Missouri Gov't PAC v. Adams*, 151 F.3d 763, 765 (8th Cir. 1998), *cert. granted on other grounds*, *Nixon v. Shrink Missouri Gov't PAC*, 525 U.S. 1121 (1999) (court enjoined Missouri's campaign finance law pending appeal); *Toledo Area AFL-CIO Council v. Pizza*, 154 F.3d 307, 311 (6th Cir. 1998) (district court preliminarily and later permanently enjoined portions of Ohio's campaign finance law, finding Act unconstitutional).

For example, in 1998, Judge Karlton of the Eastern District preliminarily enjoined California from enforcing Proposition 208, a comprehensive and restrictive campaign finance initiative passed by California voters in 1996. *California Prolife Council Political Action Committee v. Scully*, 989 F. Supp. 1282 (E.D. Cal. 1998), *aff'd*, 164 F.3d 1189 (9th Cir. 1999). In entering the injunction, the Court stated:

> "[O]nly the strangest of circumstances would suggest that a violation of the Constitution would not be subject to equitable relief." [Citation.] The burden on protected political expression that the court has found above is plainly an irreparable injury. *See, e.g., Lydo Enterprises, Inc. v. City of Las Vegas*, 745 F.2d 1211, 1213 (9th Cir. 1984) ("any loss of First Amendment rights, even briefly, can constitute irreparable injury").
>
> *Id.* at 1301.

The court's grant of preliminary injunction was affirmed by the Ninth Circuit. *California Prolife Council Political Action Committee v. Scully*, 164 F.3d 1189, 1190 (9th Cir. 1999).[8]

By directly restricting a candidate's speech, the surplus funds provision limits not only public discussion about candidates, but also discussion about issues of local concern. Limiting those types of communications is particularly damaging to open political discourse. "Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution." *Buckley*, 424 U.S. at 14.

With each day that passes, the FPPC's insistence that Senator Migden refrain from spending her so-called "surplus" funds directly infringes the Senator's ability to communicate with the voters in her district. Migden Decl., ¶ 8; Ross Decl., ¶ 11. Within the next few weeks the Senator will be faced with the decision whether to spend her time communicating with voters or fundraising in a futile effort to make up for the inability to spend the $647,000 in campaign funds languishing in her accounts. Migden Decl., ¶ 8. She will approve a campaign plan that either adequately funds her communications with her constituents, or allows for so little communication that it "would be insufficient to ensure that Senator Migden effectively communicates with all the voters in her district." Ross Decl., ¶ 10. If Senator Migden cannot begin spending the campaign funds she has on hand now to produce and prepare for distribution communications that the voters receive by early May, "many absentee voters would have received and returned their ballots, and Senator Migden would have lost forever the ability to persuade them." Ross Decl., ¶ 11.

The harm worked by the FPPC's enforcement of the surplus funds provision against Senator Migden is immediate, it is irreparable, and it will worsen as the June election draws near. *See Elrod v. Burns*, 427 U.S. at 374 n.29 ("The timeliness of political speech is particularly important."); *Shrink Missouri Gov't PAC v. Adams*, 151 F.3d at 764 (plaintiff wishing to contribute more than the limits "likely will suffer immediate and irreparable harm" as election nears). A decision in May would

[8] In enjoining Proposition 73, another statewide campaign finance initiative, the same court stated that "[b]ecause the constitutional violations demonstrated by plaintiffs are, by their nature, irreparable, and no adequate legal redress can compensate for the loss of political expression, plaintiffs are entitled to a permanent injunction." *See Service Employees Int'l Union v. Fair Political Practices Comm'n*, 721 F. Supp. 1172, 1180 (E.D. Cal. 1989), *aff'd*, 955 F.2d 1312 (9th Cir. 1992) (footnote omitted).

come too late because many absentee voters would already have voted and even as to those who had not yet voted, "it likely would be impossible to gear up quickly enough to produce and send campaign mail, and to buy sufficient time on radio and cable." Ross Decl., ¶ 11. In sum, a continuing freeze on Senator Migden's pre-Proposition 34 funds will, without a doubt, cause irreparable harm to her ability to effectively compete in the June 2008 primary election.

III.

SERIOUS QUESTIONS ARE RAISED AND THE BALANCE OF HARDSHIPS TIPS IN FAVOR OF PLAINTIFFS

The alternative test for issuance of an injunction is that plaintiffs show that "serious questions are raised and the balance of hardships tips in [their] favor." *Sammartano*, 303 F.3d at 965. That test surely is met here. The foregoing discussion has demonstrated the seriousness of the constitutional question that is presented and the irreparable harm that plaintiffs will suffer if an injunction does not issue. The final point for this alternative test is the relative lack of harm that the FPPC will suffer if section 89519 is enjoined pending a full hearing on the merits.

It is clear, of course, that a governmental entity has a generalized interest in the enforcement of its duly passed statutes. But it also has an equally strong interest in the protection of the First Amendment rights of its citizens. *See* Cal. Gov't Code § 83111.5 (the FPPC "shall take no action . . . that would abridge constitutional guarantees of free speech"). Thus, the hardship to the FPPC must be found, if at all, in the particularized harm that will befall it if an injunction issues and the plaintiffs and others engage in the otherwise forbidden activity.

To the extent that the FPPC was relying on section 89519 to advance any important governmental interest, it already has admitted that it can allow expenditures that violate section 89519 without any long term harm – otherwise it could not have granted the waiver to Senator Corbett. *In re Pirayou*, 19 FPPC Opn. 1.

The other particularized "harm" is that there will be more political speech during the June election and that Senator Migden will be permitted greater communication with the voters. That is democracy, not hardship. *See Buckley*, 424 U.S. at 14 (quoting *New York Times Co. v. Sullivan*,

376 U.S. 254, 270 (1964)) (reflecting on "our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open'").

The U.S. Supreme Court, speaking through Chief Justice Roberts, has declared that "[w]here the First Amendment is implicated, the tie goes to the speaker, not the censor." *Wisconsin Right to Life, Inc.*, 127 S. Ct. at 2669. Here there is not even a tie; the scales tip firmly toward Senator Migden's ability to effectively communicate with her constituents by spending all the campaign funds she has on hand. Serious questions are raised and the balance of hardships tips sharply in favor of the plaintiffs.

IV.

THE COURT SHOULD WAIVE THE BOND REQUIREMENT

Plaintiffs respectfully request that the court exercise its discretion under Federal Rule of Civil Procedure 65(c) to waive the bond requirement in this case because plaintiffs are likely to prevail on the merits, the requested injunctive relief is a matter of constitutional significance, and the FPPC is unlikely to suffer economically because of the injunction. *Baca v. Moreno Valley Unified Sch. Dist.*, 936 F. Supp. 719, 738 (C.D. Cal. 1996) (waiving bond requirement for preliminary injunction because plaintiff has high probability of success on the merits, defendants will not incur significant cost of damages because of injunction, and "a bond would have a negative impact on plaintiff's constitutional rights") (citations omitted); *Doctor John's, Inc. v. City of Sioux City*, 305 F. Supp. 2d 1022, 1043-44 (N.D. Iowa 2004) ("Requiring a bond to issue before enjoining potentially unconstitutional conduct by a governmental entity simply seems inappropriate, because the rights potentially impinged by the governmental entity's actions are of such gravity that protection of those rights should not be contingent upon an ability to pay."); *see also People ex rel. Van De Kamp v. Tahoe Regional Planning Agency*, 766 F.2d 1319, 1325-26 (9th Cir. 1985).

CONCLUSION

Senator Migden merely asks that she, like other state candidates, be allowed to use all her lawfully raised campaign funds to communicate with voters in the upcoming June primary election. No harm can befall the state if she does so, but much harm can befall Senator Migden and the

community if she does not. Plaintiffs respectfully request, therefore, that the Court grant plaintiffs' motion for a preliminary injunction.

Dated: March 7, 2008

Respectfully submitted,

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(00053730-8)

PROOF OF SERVICE

I, the undersigned, declare under penalty of perjury that:

I am a citizen of the United States, over the age of 18, and not a party to the within cause or action. My business address is 201 Dolores Avenue, San Leandro, CA 94577.

On March 7, 2008, I served a true copy of the following document(s):

Plaintiffs' Notice of Motion and Motion for Preliminary Injunction; Memorandum of Points and Authorities in Support Thereof

on the following party(ies) in said action:

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☐ **BY UNITED STATES MAIL:** By enclosing the document(s) in a sealed envelope or package addressed to the person(s) at the address above and

☐ depositing the sealed envelope with the United States Postal Service, with the postage fully prepaid.

☐ Placing the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the businesses' practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, located in San Leandro, California, in a sealed envelope with postage fully prepaid.

☒ **BY OVERNIGHT DELIVERY:** By enclosing the document(s) in an envelope or package provided by an overnight delivery carrier and addressed to the persons at the addresses listed. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

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I declare, under penalty of perjury, that the foregoing is true and correct. Executed on March 7, 2008, in San Leandro, California.

Kristen Snider